INTERIOR BOARD OF INDIAN APPEALS

Emory Tendoy, et al.; Ernestine Broncho Werelus, et al.; and Kevin H. Loveland
v. Portland Area Director, Bureau of Indian Affairs

33 IBIA 303 (05/24/1999)

Related Board cases:
30 IBIA 224
Reconsideration denied, 30 IBIA 269
32 IBIA 18
33 IBIA 303

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

EMORY TENDOY ET AL.,
ERNESTINE BRONCHO WERELUS ET AL.,
and
KEVIN H. LOVELAND
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 98-40-A, 98-41-A, 98-76-A Decided May 24, 1999

Appeals from two decisions concerning Lease 91-53 on the Fort Hall Reservation.

One decision affirmed; one decision vacated and remanded.

1. Bureau of Indian Affairs: Administrative Appeals: Generally

   A notice of appeal filed under 25 C.F.R. Part 2 may not be dismissed summarily on the grounds that it does not bear the label "Notice of Appeal." The purpose of the labeling requirement in 25 C.F.R. § 2.9(c) is to assist the Bureau of Indian Affairs in identifying the document as a notice of appeal.

2. Bureau of Indian Affairs: Administrative Appeals: Generally

   The Bureau of Indian Affairs' appeal regulations do not require that a notice of appeal be dismissed summarily in a case where the appellant has not initially served the notice on all interested parties. Rather, the regulations contemplate that the deciding official will ensure that service is completed. 25 C.F.R. § 2.12(c), (f).

APPEARANCES: Howard A. Belodoff, Esq., Boise, Idaho, for Emory Tendoy, Lena Stone, Alfreda Denny, Mary Warren, and Gladys Mosho; Ernestine Broncho Werelus, pro se and for Carlino Broncho, Sr., Delphine A. Eagle, Louise Johnson, and Delphine B. Martinez; Thomas J. Lyons, Esq., Pocatello, Idaho, for Kevin H. Loveland; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director in Docket Nos. IBIA 98-40-A and 98-41-A; Stanley Speaks, Portland Area Director, pro se, in Docket No. IBIA 98-76-A.

OPINION BY ADMINISTRATIVE JUDGE VOGT

These appeals all concern Fort Hall Lease 91-53. The appeals in Docket Nos. IBIA 98-40-A and 98-41-A pertain to a November 3, 1997, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), holding, inter alia, that the lease authorized grazing as well as dry farming. Appellants in these two appeals are owners of interests in some of the allotments subject to the lease. 1/ The appeal in Docket No. IBIA 98-76-A pertains to the Area Director's February 25, 1998, decision cancelling the lease. Appellant in this appeal is the lessee, Kevin H. Loveland (Loveland).

For the reasons discussed below, the Board affirms the Area Director's November 3, 1997, decision; vacates the Area Director's February 25, 1998, decision, and remands the matter to him for further action.

Background

Lease 91-53 was approved by the Superintendent, Fort Hall Agency, BIA, on August 18, 1993, for a term of 10 years, beginning January 1, 1991. The lease covers 14 allotments on the Fort Hall Reservation, totalling 1449.40 acres. 2/ It provides that only 1206.30 acres are to be cultivated and that the rent is $15 per acre for farmable land, and $2 per acre for nonfarmable land. The total annual rent is stated to be $18,452.70. 3/

1/ Appellants in Docket No. IBIA 98-40-A are Emory Tendoy, Lena Stone, Alfreda Denny, Mary Warren, and Gladys Mosho (collectively, Tendoy). Appellants in Docket No. IBIA 98-41-A are Ernestine Broncho Werelus, Carlino Broncho, Sr., Delphine A. Eagle, Louise Johnson, and Delphine B. Martinez (collectively, Werelus).

2/ The allotments included in the lease are Nos. 625, 628½, 694, 1029, 1030, 1031, 1242, 1243, 1244, 1245, 1246, 1249, T1250, and T1350-A.

According to materials in the administrative record, 45 individuals hold interests in these allotments. Two of the allotments, T1250 and T1350-A, are owned by the Shoshone-Bannock Tribes (Tribe).

3/ This total is based upon a rate of $15 for each of the 1206.30 farmable acres and a rate of $2 for each of 179.10 acres classified as nonfarmable. The lease also includes 64 acres deemed to be unusable and for which no rent is charged.

Under 25 C.F.R. § 162.8 and the rental adjustment provision in the lease, the rent was subject to review after 5 years. In December 1994, BIA prepared an appraisal for this purpose. The 1994 appraisal showed that the fair annual rental for the lease had decreased since the pre-lease appraisal prepared in 1990 and was also lower than the rent being paid under the lease. Upon review of the 1994 appraisal, BIA determined that the rent should not be reduced for the second 5 years of the lease.

On September 12, 1996, the Superintendent wrote to Loveland, stating:

> We have reviewed your dryfarm lease #91-53 * * *.
>
> The front page of Lease #91-53 indicates this lease is granted for dryfarm purposes with no grazing privileges with the Resolution from the Tribal Council supporting dryfarming only. You will not be allowed to graze/pasture livestock on this lease unless you apply for a lease modification granting grazing/pasture privileges.

Loveland appealed the Superintendent's letter to the Area Director, who issued a decision on December 31, 1996, holding that the lease authorized grazing as well as dry farming. Tendoy and Werelus appealed the Area Director's decision to the Board. They contended, inter alia, that they had not been given an opportunity to participate in the proceedings before the Area Director.

In response to the appeals filed by Tendoy and Werelus, the Area Director conceded that the landowners had not been given notice when the matter was pending before him. He asked the Board to remand the matter to him so that he could give the landowners notice and an opportunity to participate. Although Tendoy and Werelus objected to the Area Director's request, the Board found that it would be in the interest of all parties to remand the matter to the Area Director. It therefore vacated the Area Director's December 31, 1996, decision and remanded the case to him. Tendoy v. Portland Area Director, 30 IBIA 224, recon. denied, 30 IBIA 269 (1997).

On remand, all landowners were notified of the proceedings. Tendoy and Werelus filed answers to Loveland's filings. The Superintendent also filed a response, stating in part:

> After reviewing all of the documents, we believe that Mr. Loveland would be correct in the assumption that the lease permitted grazing. His offer included grazing, the appraisal included grazing (although he would not have seen a copy of it), the lease provisions included grazing provisions, and he received no correspondence to indicate that he would not be permitted to graze as he had made his application.

Superintendent's Aug. 6, 1997, Letter at 2.

The Area Director issued a decision on November 3, 1997, in which he again held that the lease authorized grazing as well as dry farming. In support of this holding, the Area Director relied in part upon various provisions in the lease which refer to grazing and upon the consent forms signed by some of the landowners, authorizing the Superintendent to execute a lease or leases "for farming and grazing purposes" on any lands owned by them on the Fort Hall Reservation. The Area Director also discussed the rental provision of the lease, with regard to which he stated:

> Your [i.e., Loveland's] application to lease indicates an offer of $15 per acre for farm, and $1 for grazing. Based on the difference between the appraised value ($16,888.20) and the approved lease amount ($18,452.70), $1,564.50 may be considered as compensation for the right to graze. However, there is no documentation in the file indicating the basis of the $2 per acre for nonfarmable acres, or for the $15 per acre for farmable when the appraisal was for $14 per acre. We conclude that the additional compensation was for the right to graze.

Area Director's Nov. 3, 1997, Decision at 5.

The Area Director rejected arguments made by Tendoy and Werelus that the lease had been improperly approved for a 10-year term. However, in response to their contention that Loveland was not in compliance with the Brucellosis Control Stipulation in the lease, he found that there was no evidence of compliance. He therefore ordered Loveland to show compliance with the stipulation within 10 days or face cancellation of the lease under 25 C.F.R. § 162.14.

Tendoy and Werelus appealed from the Area Director's November 3, 1997, decision insofar as it concerned the lease terms.

On December 2, 1997, the Area Director issued a decision cancelling Lease 91-53 on the grounds that Loveland had failed to submit proof of compliance with the Brucellosis Control Stipulation.

Loveland appealed the December 2, 1997, decision to the Board. On January 20, 1998, the Board received a letter from the Area Director stating that Loveland had filed a timely response but that the response had been misdirected within the Area Office. The Area Director asked the Board to remand the matter so that he could consider it on the merits. On January 22, 1998, the Board remanded the case to the Area Director. Loveland v. Acting Portland Area Director, 32 IBIA 18 (1998).

Upon remand, the Area Director took Loveland's response into consideration. Loveland had stated:

> Any breeding stock that has been added to our herd fits the [third provision of the Brucellosis Control Stipulation]. We have kept some of our own heifers for breeding, and they have been vaccinated, as required by Idaho law. I believe this ensures compliance with the grazing terms of this lease.

Loveland's Nov. 22, 1997, Letter to the Area Director.

On February 25, 1998, the Area Director again cancelled Lease 91-53, upon finding that the information provided by Loveland was inadequate to show compliance with the Brucellosis Control Stipulation.

Loveland appealed the February 25, 1998, decision to the Board.

Discussion and Conclusions

Docket Nos. IBIA 98-40-A and 98-41-A

As stated above, these two appeals, filed by Tendoy and Werelus, challenge the Area Director's November 3, 1997, decision. Only Tendoy made arguments. 4/

[1] Tendoy first argues that the Area Director should not have considered Loveland's appeal from the Superintendent's September 12, 1996, letter because Loveland failed to label his filing as a notice of appeal.

It is true, as Tendoy contends, that BIA's appeal regulations require an appellant to label his/her notice of appeal. 25 C.F.R. § 2.9(c). There is nothing in the regulations, however, which supports Tendoy's contention that BIA must dismiss an unlabeled notice of appeal. In fact, except with respect to untimely appeals, which must be dismissed, the regulations clearly disfavor summary dismissals. See 25 C.F.R. § 2.17.

The purpose of the labeling requirement in section 2.9(c) was discussed in the preamble to the present version of 25 C.F.R. Part 2 when it was published as a final rule. In response to a comment that the requirement for labeling envelopes was superfluous, BIA stated: "Appeal documents are not always self-evident. The purpose of identifying the contents on the envelope is to speed processing. Failure to include this on the envelope, however, is not grounds for summary dismissal." 54 Fed. Reg. 6478, 6479 (Feb. 10, 1989). While this comment and BIA's response concerned only labels on envelopes, the same analysis is applicable to labels on the appeal documents themselves. The purpose of such a label is to assist BIA in identifying a document as a notice of appeal. The lack of such a label, however, is not grounds for dismissal of an appeal.

4/ As to Werelus' filings, only her notice of appeal may be considered, because it is the only one of her filings which she served on the interested parties. Although advised of her service obligations, Werelus failed to serve either her opening brief or her reply brief on the parties. In addition, her opening brief was eight days late, and she failed to request an extension of time.

In any event, Werelus made no independent arguments in any of her filings but simply purported to adopt the arguments made by Tendoy. Accordingly, even if her briefs could be considered here, it would make no difference.

The text of Loveland's October 9, 1996, letter made it clear that he intended to appeal from the Superintendent's September 12, 1996, letter. The Board finds that the Area Director reasonably construed Loveland's letter as a notice of appeal and therefore properly accepted it as an appeal even though it lacked a label.

[2] In another procedural argument, made for the first time in his reply brief, Tendoy contends that the Area Director should have dismissed Loveland's appeal because Loveland failed to serve his notice of appeal on the landowners. 5/

BIA's appeal regulations require that an appellant serve his notice of appeal on "all known interested parties." 25 C.F.R. § 2.9(a). Because the Superintendent did not serve his decision on the landowners, 6/ Loveland probably would not have realized that the landowners were interested parties. In any event, as is the case with respect to the labeling requirement, there is nothing in 25 C.F.R. Part 2 which requires BIA to dismiss an appeal immediately when the appellant has not served the interested parties. Rather, the regulations provide that, where a notice of appeal has been timely filed, the BIA deciding official may serve, or order the appellant to serve, the other parties. 25 C.F.R. § 2.12(c), (f).

In this case, the Area Director did not initially take either of these actions. However, as discussed above, the Area Director has conceded that he erred in failing to ensure that notice of the appeal was sent to the landowners. His concession was the basis for the Board's remand of Tendoy and Werelus' earlier appeals. Following remand, the landowners were given notice of the appeal and an opportunity to respond.

The Board finds that (1) the Area Director was not required to dismiss Loveland's notice of appeal immediately for failure to serve interested parties although, as he has conceded, the Area Director erred in not requiring that interested parties be served; and (2) the Area Director's error has been cured.

Tendoy next argues that the Area Director erred in finding that Lease 91-53 authorized grazing as well as dry farming. Tendoy notes that the word "DRYFARM" is typed in above the printed word "LEASE" on the first page of the lease. He contends that, because a typewritten

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5/ Normally, the Board does not consider arguments made for the first time in a reply brief, because opposing parties have had no opportunity to respond. Lopez v. Acting Aberdeen Area Director, 29 IBIA 5, 10 (1995). Given the lengthy and somewhat confusing proceedings in these appeals, and the fact that opposing parties will not be prejudiced here because Tendoy's argument must fail, the Board makes an exception in this case.

6/ Under 25 C.F.R. § 2.7(a), the Superintendent was required to give written notice of his decision to "all interested parties known to [him]."

entry on a lease takes precedence over printed words, the word "DRYFARM" takes precedence in this case over printed language in the lease indicating that the lease was intended to include grazing. Tendoy's argument, however, ignores another word typed in immediately before the word "LEASE." That is the word "Renewal." Because Loveland's previous lease included grazing, the clear implication of the word "Renewal" is that Lease 91-53 also includes grazing. The two typed-in words contradict each other. Thus, neither can be deemed controlling.

As the Area Director points out, there are provisions in the lease indicating that grazing was intended to be included. The lease includes a Plan of Conservation Operations which, although a form document containing 15 standard provisions, allows for the inclusion of additional provisions specific to the lease at hand, as well as the exclusion of any of the standard provisions not applicable to that lease. These additions and exclusions are provided for in Paragraph 16 of the form document, which is titled "Special Requirements." Paragraph 16 of the Plan of Conservation Operations for Lease 91-53 includes four additional provisions, including one in Paragraph 16.C which states: "The lessee will be required to maintain a 4" average grass leaf height on all acres grazed yearly for proper management." In addition, Paragraph 16 specifically excludes five of the standard lease provisions, all relating to farming, but does not exclude the two standard provisions relating to grazing. 7/ These two provisions state:

> 9. GRAZING The lessee agrees to manage his livestock so as to prevent the grazing resource from being damaged. The Superintendent or his authorized representative shall determine mis-use (if any) of the grazing resource and the lessee agrees to comply with his instructions to prevent further damage.
>
> 10. LIVESTOCK CONTROL The lessee will be responsible for keeping his or her livestock confined to the leased area and for following the attached Brucellosis Control Stipulation. The lessee will comply with Tribal Ordinances, Federal and State Laws and Regulations concerning livestock disease programs.

While it is conceivable that the failure to exclude these two provisions was mere inadvertence, the specific inclusion of Paragraph 16.C was an affirmative act and cannot be deemed inadvertent. Thus, the provisions of the Plan of Conservation Operations indicate that the lease was intended to include grazing.

7/ In support of his appeal from the Superintendent's Sept. 12, 1996, letter, Loveland contended that he had another lease, which was dry farm only, in which the two standard grazing provisions had been deleted. He furnished a copy of the Plan of Conservation Operations for that lease, Lease 94-115, which explicitly excluded the provisions in Paragraphs 9 and 10, as well as the same five provisions excluded from Lease 91-53.

The lease also includes the Brucellosis Control Stipulation mentioned in Paragraph 10 of the Plan of Conservation Operations. The inclusion of this stipulation in the lease is a further indication that the lease was intended to include grazing.

Although there are inconsistencies in the lease, the language of the lease as a whole supports the conclusion that grazing was intended to be included.

Tendoy contends, however, that the parties to the lease did not intend for the lease to include grazing. For this proposition, Tendoy cites the August 29, 1990, tribal resolution approving the lease on behalf of the Tribe. This resolution states: "LONE PINE FARMS, c/o KARL & KEVIN LOVELAND are hereby approved a 10-YEAR DRY FARM LEASE beginning from date of approval at the negotiated rate of $15.00 per farmable acre and $2.00 per nonfarmable acre on [Allotments T1250 and T1350-A]."

Tendoy argues that this language indicates that the Tribe specifically rejected Loveland's lease application insofar as it sought grazing privileges. While it is conceivable that the Tribe had such an intent in mind, the language itself does not specifically express such an intent. As the Area Director points out, the Tribe has not participated in this appeal, although it has been served with all the decisions and pleadings. Presumably, if it had objected to the conclusion reached by the Area Director in his November 3, 1997, decision, it would have made an appearance and stated its position in this appeal.

What Tendoy does not appear to recognize is that the tribal resolution he cites is applicable only to the two tribal allotments subject to Lease 91-53. The resolution does not purport to apply to the individually owned allotments in which Tendoy et al. hold interests. Thus, even if Tendoy's interpretation of the tribal resolution is correct, it would not help Tendoy because, at most, it would mean that grazing would be disallowed on the two tribal allotments.

Tendoy produces nothing which purports to show the intent of any of the individual landowners. The only documents in the record which reflect the intent of any of those landowners are the consent forms signed by some of them. As noted above, these forms authorized the Superintendent to execute a lease or leases "for farming and grazing purposes " on any reservation lands owned by the signing landowners. Although these are general consent forms, it is reasonable to conclude that the landowners who signed them intended that the leases they authorized would include grazing privileges.

While the intent of the majority of the individual lessors cannot be deduced from the record or from any materials submitted by Tendoy, the intent of the lessee is evident. Loveland explicitly sought a lease including grazing privileges and clearly understood that the lease he signed included such privileges.

Inasmuch as the lessee and some of the individual lessors intended that Lease 91-53 include grazing privileges, and the intent of the remaining individual lessors has not been shown, the Board rejects Tendoy's contention that the parties to the lease intended to exclude grazing privileges from the lease.

Next, Tendoy contends that the rental provisions in Lease 91-53 do not include compensation for grazing.

Unfortunately it appears that, as the Area Director's decision recognized, BIA records do not show how the rental rates in the lease ($15 per farmable acre and $2 per nonfarmable acre) were arrived at. According to a March 16, 1998, declaration made by the Agency Supervisory Soil Conservationist, both the 1206.30 farmable acres and the 179.10 nonfarmable acres were approved for grazing. Thus, an amount for grazing was presumably incorporated into the rental rate for the farmable acres as well as the rate for the nonfarmable acres. As stated above, the Area Director considered the $1,564.50 difference between the lease rental and the amount for which BIA appraised the lease for farming purposes to be compensation for grazing.

No matter how the rental is broken down (i.e., how much is attributed to farming and how much to grazing), the lease provides that Loveland is to pay a total of $18,452.70 in rent per year for the activities authorized under the lease. Those activities, as the Board concluded above, include both dry farming and grazing. Thus, the rental necessarily includes compensation for grazing. Tendoy may be contending that the compensation is inadequate to cover both dry farming and grazing. Because the Board has no authority either to rewrite the lease or to award damages, and therefore could not grant him any relief in this regard, the Board does not consider this possible argument.

Next, Tendoy argues that Lease 91-53 should have been approved for only a 5-year term, rather than a 10-year term. He cites 25 C.F.R. § 162.8(c), which provides: "Farming leases not granted for the purpose of growing specialized crops shall not exceed five years for dry-farming land or ten years for irrigable land."

The Area Director noted in his November 3, 1997, decision that Loveland had raised the possibility of drilling a well, a possibility that presumably would have made the lease subject to 25 C.F.R. § 162.8(b). 8/ This possibility may have been what led the Tribe to approve the lease for a 10-year term, although there is no specific statement from the Tribe in this regard.

8/ 25 C.F.R. § 162.8(b) provides: "Leases may be made for 25 years for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops."

The lease itself reflects the possibility that a well would be drilled. Paragraph 16.D of the Plan of Conservation Operations provides:

> In the event, the lessee decides to drill an exploratory well/irrigation production well on the leased premises, a permit will be required from [the Tribe] and environmental documentation prepared along with drilling specifications provided by [BIA], Branch of Agriculture. The farmable acres suitable for irrigation application will be identified on the land and acreages provided to [BIA's] Leasing Department for rental to be paid at the pre-established irrigated farmable rate * * *.

While the Tribe's Land Use Committee eventually disapproved the drilling of a well, it is not clear whether the Superintendent was aware of this when he approved the lease. It appears most likely that the Superintendent approved the lease for a 10-year term on the basis of the Tribe's approval of a 10-year term and the fact that the lease reflected the possibility that a well would be drilled. However, as the Area Director recognized, there is no specific documentation of this reasoning in the record.

The Board cannot condone the Agency's inadequate documentation of its leasing decisions. In the circumstances of this case, however, the Board finds that the Superintendent had justification for approving the lease for a 10-year term.

The Board observes that, in the circumstances of this case, the landowners may well have benefitted financially from the granting of a 10-year lease, given the decrease in the appraised rental value for the property. See n.3, supra. That is, had a new lease been issued in 1996, it is conceivable that the rent would have been lower than the rent in Lease 91-53.

For the reasons discussed, the Board affirms the Area Director's November 3, 1997, decision.

Docket No. IBIA 98-76-A

This is Loveland's appeal from the Area Director's cancellation of Lease 91-53 for failure to show compliance with the Brucellosis Control Stipulation in the lease.

The Brucellosis Control Stipulation provides:

> Lessees or permittees are required to participate in the State-Federal Brucellosis Eradication Program. All herds must participate in the area certification and re-certification program and when found to be infected, must

remain under quarantine, be segregated from all other herds, and complete scheduled retests until released from quarantine. All female calves to be kept from [sic] breeding purposes shall be vaccinated between (4) and (12) months of age.

Breeding cattle being transferred into the Indian lands covered by lease or permit must comply with the following:

1. Breeding cattle if originating from established beef herds must be Brucellosis tested within 12 months of entry and present evidence of test (test charts) to Range Office prior to grazing permits being issued.

2. Breeding cattle that are purchased or assembled must have two (2) negative tests prior to entry on Reservation lands. The first test shall be at least 120 days prior to the second test and the second test shall be within 30 days of entry onto Reservation lands. Copies of test records must be on file at the Range Office prior to grazing permits being issued.

3. Official vaccinates under 24 months of age shall be exempt from test requirements.

Failure to comply with the requirements of this stipulation shall be cause for cancellation of the lease or permit and removal of the cattle.

In his opening brief, Loveland expanded somewhat upon the statement he made in his November 22, 1997, letter to the Area Director. He also submitted an affidavit, stating:

2. As part of my lease, I maintain a herd of cattle on Fort Hall Lease No. 91-53. As part of my general practice, I maintain some of the heifers that are born on the Reservation for breeding purposes. All of the heifers that are born on the Reservation are vaccinated according to Idaho law.

3. All of the cattle in my herd fit within the Brucellosis Control Stipulation Control Provision No. 3, as they are certainly under the age of 24 months and are previously vaccinated when they are brought onto the Reservation.

4. In my letter dated November 22, 1997, wherein I indicated "We have kept some of our own heifers for breeding, and they have been vaccinated, as required by Idaho law," I was referring to heifers that were born on the Reser-

> vation and were kept for breeding purposes. These cows are vaccinated according to Idaho law prior to the cows reaching the age of 12 months.

Loveland's May 7, 1998, Affidavit.

In addition to his affidavit, Loveland relied on the Superintendent's August 6, 1997, letter to the Area Director, which stated in part:

> Idaho is a brucellosis free state. Our Tech Services staff checked to make sure that Mr. Loveland's cattle had been tagged to indicate they had been vaccinated. Since brucellosis does not exist in the state, it would serve no purpose for Mr. Loveland to submit a report to this office that his cattle were brucellosis free.

Superintendent's Aug. 6, 1997, Letter at 2.

In response to Loveland's opening brief, the Area Director filed a letter dated June 9, 1998, in which he stated:

> In his Opening Brief, [Loveland] has further clarified his operations and the fact that all cattle under the age of 24 months are vaccinated pursuant to Idaho law, and that any female calves kept for breeding purposes are also vaccinated between the age of 4 and 12 months. I have also confirmed that our Agency office does not have any evidence to contradict the facts stated by [Loveland] in his sworn Affidavit.
>
> Consequently, I am hereby asking that this Board vacate my cancellation decision dated February 25, 1998, and dismiss this appeal.

An answer brief was filed by Howard A. Belodoff, Esq., who represents Tendoy in Docket Nos. IBIA 98-40-A and 98-41-A. Mr. Belodoff stated that he was representing "the Indian landowners." Although he did not identify his clients by name, the Board assumes that he represents the same five landowners he represents in Docket Nos. IBIA 98-40-A and 98-41-A. 9/

9/ Mr. Belodoff also attempted to file a reply to the Area Director's June 9, 1998, letter. This is a filing which requires special permission from the Board under 43 C.F.R. § 4.311(b). Mr. Belodoff did not seek permission to make this filing. More importantly, he failed to certify that he had served the filing on all interested parties. Accordingly, permission to make the filing is denied, and the filing is not considered.

Werelus also filed an answer brief. She stated that she had served copies of her brief on the interested parties shown on a list purportedly attached to the brief. However, no list was attached. For purposes of this decision, the Board assumes that Werelus served all interested parties and simply neglected to attach a list of those parties.

Both Tendoy and Werelus argue that Loveland should have been required to submit more evidence of his compliance with the Brucellosis Control Stipulation. Tendoy contends that Loveland should have submitted copies of vaccination records for the cattle. Tendoy also contends that the Superintendent's August 6, 1997, statement that his "Tech Services" staff had checked the vaccination tags on Loveland's cattle is in conflict with the March 18, 1998, declaration of the Agency's Supervisory Soil Conservationist, which stated that Loveland had not used the leased property for grazing in 1996 or 1997.

The Superintendent's August 6, 1997, letter did not give the date of the cattle inspection. Nor did it state whether or not the cattle were located on Lease 91-53 at the time they were inspected. Accordingly, there is not necessarily a discrepancy between the two statements, merely a lack of complete information.

Nothing in the materials before the Board describes BIA's usual method of ensuring compliance with the Brucellosis Control Stipulation in leases of Indian lands. If it is BIA's usual practice to require a lessee to submit vaccination certificates, and Loveland was somehow relieved of this requirement, the Board would agree that Loveland should now be required to submit the certificates. However, the certificates by themselves would not prove that the cattle listed on the certificates were the same cattle as those grazing on the lease. Thus, the certificates would add little to Loveland's sworn statement.

The Area Director's June 9, 1998, letter indicates that he is satisfied with Loveland's sworn statement. However, because of the lack of information in the record as to BIA's usual compliance standards, and because of the several questions raised during the course of these proceedings, the Board finds that the matter is not yet resolved with certainty. The most efficient way of resolving it would appear to be to conduct another))this time fully documented)) inspection of Loveland's cattle.

Therefore, the Board vacates the Area Director's February 25, 1998, decision and remands this matter to him. Upon remand, the Area Director shall direct the Superintendent to conduct another inspection of Loveland's cattle and prepare a report stating the date of inspection, location and number of cattle, findings as to vaccination tags, and any other relevant information. The inspection shall be conducted as soon as possible. The Superintendent shall transmit the report to the Area Director, who shall make another determination as to Loveland's compliance with the Brucellosis Control Stipulation. If the Area Director finds a lack of com-

pliance based upon the inspection, he shall direct that the cattle be removed (or not permitted to enter) the leased allotments. If he finds that cattle are present on the lease in violation of the Brucellosis Control Stipulation, he shall initiate cancellation proceedings under 25 C.F.R. § 162.14.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's November 3, 1997, decision is affirmed, his February 25, 1998, decision is vacated, and this matter is remanded to him for the action described in the preceding paragraph. 10/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

10/ Arguments raised by any of the Appellants and not discussed in this decision have been considered and rejected.